

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

## **RODGER ORLIN EVANS,**

**Petitioner,**

v.

GEORGE TOGLIATTI, et al.,

## Respondents.

Case No. 3:19-cv-00373-MMD-CLB

ORDER

## I. SUMMARY

12 This habeas matter filed under 28 U.S.C. § 2254 comes before the Court on  
13 Respondents' motion to dismiss Petitioner Rodger Orlin Evans' *pro se* habeas petition as  
14 untimely. (ECF No. 10.) Petitioner opposed (ECF No. 14), and Respondents replied. (ECF  
15 No. 15.) Because it was filed after the statute of limitations had expired, this petition is  
16 dismissed as untimely.

## II. BACKGROUND

18 A jury found Petitioner guilty of exploitation of an elderly victim involving over  
19 \$5,000. (Exh. 51.)<sup>1</sup> The state district court sentenced Petitioner to a term of 38 to 180  
20 months, and to restitution in the amount of \$56,000. (Exh. 59.) The court entered  
21 judgment of conviction on November 3, 2015. (*Id.*)

22 The Nevada Court of Appeals affirmed Petitioner's conviction on June 20, 2016.  
23 (Exh. 80.) On October 25, 2018, the court affirmed the denial of his state postconviction  
24 habeas corpus petition, and remittitur issued on November 19, 2018. (Exhs. 94, 96.)

III

<sup>1</sup>Exhibits referenced in this order are exhibits accompanying Respondents' motion to dismiss (ECF No. 10) and are found at ECF Nos. 11, 12.

1 Petitioner mailed his federal habeas petition on July 1, 2019. (ECF No. 4.) The  
 2 Court dismissed the petition with leave to amend because, while Petitioner used the  
 3 Court's form petition, it was unclear what grounds he wished to raise. (ECF No. 3.)  
 4 Petitioner filed an amended petition on September 4, 2019. (ECF No. 5.) Respondents  
 5 have moved to dismiss the amended petition as time-barred. (ECF No. 10.)

6 **III. DISCUSSION**

7 **A. Statute of Limitations**

8 The Antiterrorism and Effective Death Penalty Act ("AEDPA") went into effect on  
 9 April 24, 1996 and imposes a one-year statute of limitations on the filing of federal habeas  
 10 corpus petitions. See 28 U.S.C. § 2244(d). The one-year time limitation can run from the  
 11 date on which a petitioner's judgment became final by conclusion of direct review, or the  
 12 expiration of the time for seeking direct review. See 28 U.S.C. § 2244(d)(1)(A). Further,  
 13 a properly filed petition for state postconviction relief can toll the period of limitations. See  
 14 28 U.S.C. § 2244(d)(2).

15 Ignorance of the one-year statute of limitations does not constitute an extraordinary  
 16 circumstance that prevents a prisoner from making a timely filing. See *Rasberry v. Garcia*,  
 17 448 F.3d 1150, 1154 (9th Cir. 2006) ("a *pro se* petitioner's lack of legal sophistication is  
 18 not, by itself, an extraordinary circumstance warranting equitable tolling").

19 **B. Timeliness**

20 As mentioned, Petitioner's judgment of conviction was filed on November 3, 2015.  
 21 (Exh. 59.) The Nevada Court of Appeals affirmed his conviction on June 20, 2016. (Exh.  
 22 80.) The 90-day period to file a petition with the United States Supreme Court expired on  
 23 September 18, 2016. Therefore, the AEDPA one-year period of limitations began to run  
 24 on September 19, 2016, and, absent tolling, would have expired on September 19, 2017.  
 25 See 28 U.S.C. § 2244(d)(1)(A).

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1 Petitioner filed his state habeas petition—247 days into the AEDPA one-year  
 2 period of limitations—on May 24, 2017.<sup>2</sup> (Exh. 83.) The Nevada Court of Appeals affirmed  
 3 the denial of his petition, and remittitur issued on November 19, 2018. The AEDPA statute  
 4 of limitations resumed running on November 20, 2018 and ended 118 days later, on  
 5 March 18, 2019.<sup>3</sup> See 28 U.S.C. § 2244(d)(2). Petitioner then filed his federal petition on  
 6 July 1, 2019, about three and a half months after the limitations period expired. (ECF No.  
 7 4.) The Court dismissed Petitioner’s first filing with leave to file an amended petition, which  
 8 Petitioner filed on September 4, 2019. (ECF No. 5)<sup>4</sup> Petitioner’s federal habeas action is  
 9 therefore untimely.

10 Accordingly, Respondents’ motion to dismiss Petitioner’s federal habeas corpus  
 11 petition, with prejudice, as time-barred, is granted.

12 **C. Certificate of Appealability**

13 Because this is a final order adverse to Petitioner, Rule 11 of the Rules Governing  
 14 Section 2254 Cases requires the Court to issue or deny a certificate of appealability  
 15 (“Certificate”). Accordingly, the Court has *sua sponte* evaluated the claims within the  
 16 petition for suitability for the issuance of a Certificate. See 28 U.S.C. § 2253(c); *Turner v.*  
 17 *Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

18 Under 28 U.S.C. § 2253(c)(2), a Certificate may issue only when the petitioner  
 19 “has made a substantial showing of the denial of a constitutional right.” For claims rejected  
 20 on the merits, a petitioner “must demonstrate that reasonable jurists would find the district  
 21 court’s assessment of the constitutional claims debatable or wrong.” *Slack v. McDaniel*,  
 22 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For

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23  
 24 <sup>2</sup>Respondents incorrectly calculated that 337 days had passed before Petitioner  
 filed his state habeas petition. (ECF No. 10 at 5.)

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 26 <sup>3</sup>Again, continuing from the initial miscalculation, Respondents incorrectly state  
 that the federal statute of limitations expired on December 17, 2018. (ECF No. 10 at 6.)

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 28 <sup>4</sup>Because the Court dismissed Petitioner’s original petition because it was unclear  
 what claims he wished to bring, he did not have a properly filed petition before the Court  
 as of July 1, 2019. Regardless, the statute of limitations had already expired at the time  
 he filed.

1 procedural rulings, a Certificate will issue only if reasonable jurists could debate: (1)  
2 whether the petition states a valid claim of the denial of a constitutional right; and (2)  
3 whether the court's procedural ruling was correct. See *id.*

4 After reviewing its determinations and rulings in dismissing Petitioner's petition, the  
5 Court finds that none of its rulings meets the *Slack* standard. The Court therefore declines  
6 to issue a certificate of appealability.

7 **IV. CONCLUSION**

8 It is therefore ordered that Respondents' motion to dismiss the petition (ECF No.  
9 10) is granted as set forth in this order. The petition is dismissed with prejudice.

10 It is further ordered that a certificate of appealability is denied.

11 The Clerk of Court is directed to enter judgment accordingly and close this case.

12 DATED THIS 5<sup>th</sup> Day of November 2020.

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15 MIRANDA M. DU  
16 CHIEF UNITED STATES DISTRICT JUDGE  
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